

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7

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BEFORE THE ADMINISTRATOR

IN THE MATTER OF)

) Docket No. EPCRA-07-2011-0005

SOUTHWEST TECHNOLOGIES, INC.)

) CONSENT AGREEMENT
) AND FINAL ORDER

Respondent,)

)
) Proceeding under Section 325(c) of the
) Emergency Planning and Community Right-to-
) Know Act, 42 U.S.C. § 11045(c)
)
)

CONSENT AGREEMENT AND FINAL ORDER

The United States Environmental Protection Agency, Region 7 (“EPA”) and Southwest Technologies, Inc. (“Respondent”) have agreed to a settlement of this action before filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

ALLEGATIONS

Jurisdiction

1. This is an administrative action for the assessment of civil penalties pursuant to Section 325(c) of the Emergency Planning and Community Right-to-Know Act (“EPCRA”), 42 U.S.C. § 11045(c).

2. This Consent Agreement and Final Order (“CA/FO”) serves as notice that EPA alleges that Respondent has violated Section 312 of EPCRA, 42 U.S.C. § 11022, and the regulations promulgated pursuant to Section 328 of EPCRA, 42 U.S.C. § 11048, and codified at 40 C.F.R. Part 370; and Section 313 of EPCRA, 42 U.S.C. § 11023, and the regulations

promulgated pursuant to Section 328 of EPCRA, 42 U.S.C. § 11048, and codified at 40 C.F.R. Part 372.

Parties

3. The Complainant, by delegation from the Administrator of EPA Region 7, and from the Regional Administrator, EPA Region 7, is the Director of the Air and Waste Management Division, EPA Region 7.

4. The Respondent is Southwest Technologies, Inc., a company registered and authorized to do business in the State of Missouri. Southwest Technologies, Inc.'s facility is located at 1746 Levee Road, in North Kansas City, Missouri, and manufactures medical devices.

Statutory and Regulatory Requirements

5. Section 312 of EPCRA, 42 U.S.C. § 11022, and the implementing regulations at 40 C.F.R. Part 370, provide that the owner or operator of a facility that is required to prepare or have available a Material Safety Data Sheet (MSDS) for hazardous chemicals under the Occupational Safety and Health Act of 1970 (OSHA) and regulations promulgated under that Act, shall submit to the Local Emergency Planning Committee (LEPC), the State Emergency Response Commission (SERC), and the fire department with jurisdiction over the facility, by March 1, 1988, and annually thereafter, a completed emergency and hazardous chemical inventory form (Tier I or Tier II report).

6. The Tier I or Tier II report must contain the information required by Section 312(d) of EPCRA and 40 C.F.R. Part 370 for hazardous chemicals present at the facility at any one time in the calendar year in amounts equal to or greater than 10,000 pounds, per 40 C.F.R. § 370.10(a)(2)(i), and for extremely hazardous substances present at the facility at any one time in an amount equal to or greater than the threshold planning quantity designated in the appendices to 40 C.F.R. Part 355, or 500 pounds, whichever is lower, per 40 C.F.R. § 370.10(a)(1).

7. Section 313 of EPCRA, 42 U.S.C. § 11023, and 40 C.F.R. §§ 372.22 and 372.30 require the owner or operator of a facility that (a) has ten or more full-time employees; (b) that is an establishment with a primary SIC major group or industry code listed in 40 C.F.R. § 372.23(a) or a primary NAICS subsector or industry code listed in 40 C.F.R. §§ 372.23(b) or (c); and (c) that "manufactured, processed, or otherwise used" a toxic chemical listed under Subsection 313(c) of EPCRA, 42 U.S.C. § 11023(c), and 40 C.F.R. § 372.65, in excess of the threshold quantity established under Section 313(f) of EPCRA, 42 U.S.C. § 11023(f), and 40 C.F.R. §§ 372.25, 372.27 or 372.28 during the calendar year, to complete and submit a Form R to the Administrator of EPA and to the State in which the subject facility is located by July 1, for the preceding calendar year, for each toxic chemical known by the owner or operator to be "manufactured, processed, or otherwise used" in quantities exceeding the established threshold quantity during that preceding calendar year.

8. As an alternative to submitting a Form R, 40 C.F.R. § 372.27 allows owners or operators of a facility subject to the requirements of Section 313(b) with respect to the manufacture, process or otherwise use of a toxic chemical to apply an alternate threshold of one million pounds per year to that chemical if the conditions set forth in 40 C.F.R. § 372.27(a) are met. If the alternate threshold for a specific toxic chemical is applicable, 40 C.F.R. § 372.27(b) allows the owner or operator to submit a certification statement (Form A) containing the information required by 40 C.F.R. § 372.95 in lieu of filing a Form R.

9. According to Section 313(f) of EPCRA, 42 U.S.C. § 11023(f), and 40 C.F.R. § 372.25, the threshold amount for reporting under Section 313(b) of EPCRA, 42 U.S.C. § 11023(b), and 40 C.F.R. § 372.30 is 25,000 pounds for any toxic chemical “manufactured or processed” and 10,000 pounds for any toxic chemical “otherwise used” for the applicable calendar year. Alternative reporting thresholds for certain other chemicals are set forth in 40 C.F.R. §§ 372.27 and 372.28.

10. Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), states that the Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to \$25,000 per day of violation, if, on the basis of any available information, the Administrator finds that such person has violated or is violating any requirement or prohibition of Sections 312 or 313, 42 U.S.C. §§ 11022 or 11023. Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), as amended by the Debt Collection Improvement Act of 1996, authorizes the United States to assess civil administrative penalties of up to \$27,500 per day for each violation that occurred between January 30, 1997, and March 15, 2004; \$32,500 per day for each violation that occurred between March 16, 2004, and January 12, 2009; and \$37,500 per day for each violation that occurred after January 12, 2009.

Definitions

11. The regulations at 40 C.F.R. § 370.66 define “extremely hazardous substance” as a substance listed in the appendices to 40 C.F.R. Part 355.

12. The regulations at 40 C.F.R. § 370.66 define “inventory form” to mean the uniform Tier I and Tier II emergency and hazardous chemical inventory published by EPA.

13. The regulations at 40 C.F.R. § 370.66 define “threshold planning quantity” as, for a substance listed in the appendices to 40 C.F.R. Part 355, the quantity listed in the column “threshold planning quantity” for that substance.

14. EPCRA § 329(4), 42 U.S.C. § 11049(4), and the regulations at 40 C.F.R. §§ 370.66 and 372.3 define “facility” as all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with such person). Under 40 C.F.R. § 372.3, a facility may contain more than one establishment.

15. The regulations at 40 C.F.R. § 372.3 define “full-time employees” as “2,000 hours per year of full-time equivalent employment. A facility would calculate the number of full-time employees by totaling the hours worked during the calendar year by all employees, including contract employees, and dividing that total by 2,000 hours.”

16. The regulations at 40 C.F.R. § 372.3 define “toxic chemical” as a chemical or chemical category listed in 40 C.F.R. § 372.65.

17. The regulations at 40 C.F.R. § 372.3 define “manufacture” as “to produce, prepare, import or compound a toxic chemical. Manufacture also applies to a toxic chemical that is produced coincidentally during the manufacture, processing, use or disposal of another chemical or mixture of chemicals, including a toxic chemical that is separated from that other chemical or mixture of chemicals as a byproduct, and a toxic chemical that remains in that other chemical mixture of chemicals as an impurity.”

18. The regulations at 40 C.F.R. § 372.3 define “process” to mean the preparation of a toxic chemical, after its manufacture, for distribution in commerce: (1) in the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such substance; or (2) as part of an article containing the toxic chemical. Process also applies to the processing of a toxic chemical contained in a mixture or trade name product.

19. The regulations at 40 C.F.R. § 372.3 define “otherwise use” to mean any use of a toxic chemical, including a toxic chemical contained in a mixture or other trade name product or waste, that is not covered by the terms “manufacture” or “process.” Otherwise use of a toxic chemical does not include disposal, stabilization (without subsequent distribution in commerce), or treatment for destruction unless: (1) the toxic chemical that was disposed, stabilized, or treated for destruction was received from off-site for the purposes of further waste management; or (2) the toxic chemical that was disposed, stabilized, or treated for destruction was manufactured as a result of waste management activities on materials received from off-site for the purposes of further waste management activities. Relabeling or redistributing of the toxic chemical where no repackaging of the toxic chemical occurs does not constitute otherwise use or processing of the toxic chemical.

Factual Allegations and Alleged Violations

20. EPA alleges that Respondent has violated EPCRA and federal regulations promulgated pursuant to EPCRA, as follows:

21. Respondent is, and at all times referred to herein was, a “person” as defined by Section 329(7) of EPCRA, 42 U.S.C. § 11049(7).

22. Respondent’s facility, located at 1746 Levee Road, in North Kansas City, Missouri, is a “facility” as that term is defined by Section 329(4) of EPCRA, 42 U.S.C. § 11049(4), and by 40 C.F.R. § 372.3.

23. Respondent's facility has ten or more "full-time employees" pursuant to Section 313(b)(1)(A) of EPCRA, 42 U.S.C. § 11023(b)(1)(A), and as defined by 40 C.F.R. § 372.3.

24. Respondent's facility is classified as NAICS Code 3391 13 – surgical appliance and supplies manufacturing.

25. Acrylamide is an "extremely hazardous substance" within the meaning of 40 C.F.R. § 370.66 because it is listed in the appendices to 40 C.F.R. Part 355, and as such, Respondent is required to prepare or have available an MSDS for acrylamide under OSHA at its facility.

26. The threshold planning quantity for acrylamide designated in the appendices to 40 C.F.R. Part 355 is 1,000 pounds or 10,000 pounds, depending on the physical form of the chemical. Pursuant to 40 C.F.R. § 370.10(a)(1), the minimum threshold for reporting is the threshold planning quantity or 500 pounds, whichever is lower.

27. At some time during each of the calendar years of 2007, 2008, and 2009, acrylamide was present at Respondent's facility in amounts equal to or greater than 500 pounds.

28. Acrylamide is a "toxic chemical" within the meaning of 40 C.F.R. § 372.3 because it is listed in 40 C.F.R. § 372.65.

29. Pursuant to 40 C.F.R. § 372.25, the threshold reporting quantity for acrylamide processed at a facility is 25,000 pounds per year.

30. Acrylamide was manufactured, processed, or otherwise used at Respondent's facility in excess of the applicable threshold quantity during 2007, 2008, and 2009.

31. On March 4, 2011, a duly authorized representative from EPA, Region 7, conducted an inspection of Respondent's facility.

Failure to Submit Chemical Inventory Form in a Timely Manner

32. Paragraphs 1 through 30 are incorporated by reference as if fully set forth herein.

33. Respondent failed to submit a completed emergency and hazardous chemical inventory form for acrylamide to the SERC, the LEPC, or the local fire department with jurisdiction over the facility by the March 1 deadline each year for reporting years 2007, 2008, and 2009. Respondent submitted Tier II reports for acrylamide for each of these years on or about March 7, 2011.

34. The failure to timely submit a completed emergency and hazardous chemical inventory form for acrylamide is a violation of Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), and 40 C.F.R. § 370.40(a).

Failure to Submit Form A in a Timely Manner

35. Paragraphs 1 through 30 are incorporated by reference as if fully set forth herein.

36. Respondent failed to submit Form A reports for acrylamide to the Administrator of EPA and the State of Missouri by the July 1 deadline each year for reporting years 2007, 2008, and 2009. Respondent submitted the Form A reports on or about September 27, 2011.

37. The failure to timely submit Form A reports for acrylamide is a violation of Section 313(a) of EPCRA, 42 U.S.C. § 11023(a), and 40 C.F.R. § 372.30.

CONSENT AGREEMENT

38. Respondent and EPA agree to the terms of this CA/FO and Respondent agrees to comply with the terms of the Final Order portion of this CA/FO.

39. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth above, and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this CA/FO.

40. Respondent neither admits nor denies the factual allegations set forth above.

41. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above and its right to appeal the Final Order portion of this CA/FO.

42. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorneys' fees incurred as a result of this action.

43. Respondent certifies by signing this CA/FO that, to the best of its knowledge, Respondent's facility is in compliance with all requirements of Sections 312 and 313 of EPCRA, 42 U.S.C. §§ 11022 and 11023, and all regulations promulgated thereunder.

44. This CA/FO addresses all civil and administrative claims for the EPCRA violations identified in above. Complainant reserves the right to take enforcement action with respect to any other violations of EPCRA or other applicable law.

45. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of the civil penalty as set forth in the Final Order.

46. Nothing in this CA/FO shall be construed as a release from any other action under law and/or regulation administered by EPA. Nothing contained in the Final Order portion of this CA/FO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

47. Late Payment Provisions. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on a civil or stipulated penalty if it is not paid by the date required. Interest will be assessed at a rate of the United States Treasury tax and loan rate in accordance with 31 C.F.R. § 901.9(b). A charge will be assessed to cover the costs of the debt collection, including processing and handling costs and attorneys' fees. In addition, a non-payment penalty charge of six (6) percent per year, compounded annually, will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due. Any such non-payment penalty charge on the debt will accrue from the date the penalty payment becomes due and is not paid. 31 C.F.R. §§ 901.9(c) and (d).

48. Failure to pay the assessed penalty may result in the referral of this matter to the United States Department of Justice for collection. If payment is not received on or before the due date, interest will be assessed at the annual rate established by the Secretary of the Treasury, pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

49. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this CA/FO and to legally bind Respondent to it.

FINAL ORDER

Pursuant to the provisions of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11045, and based upon the information set forth in this Consent Agreement, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a civil penalty of Nineteen Thousand Eight Hundred Dollars (\$19,800), plus accrued interest on the outstanding balance, according to the payment schedule set forth below:
 - a. Ten Thousand Dollars (\$10,000) within thirty days of the effective date of this fully executed Consent Agreement and Final Order; and
 - b. Nine Thousand Eight Hundred Thirty-Two Dollars and Twelve Cents (\$9,832.12) on or before November 1, 2012.
2. Respondent, at its discretion, may accelerate payment of the penalty.
3. Payment shall be made by cashier's or certified check, made payable to the "United States Treasury," and shall be remitted to:

U.S. Environmental Protection Agency, Region 7
Fines and Penalties
Cincinnati Finance Center

P.O. Box 979077
St. Louis, Missouri 63197-9000.

This payment shall reference docket number EPCRA-07-2011-0005.

4. A copy of the check should be sent to:

Regional Hearing Clerk
United States Environmental Protection Agency – Region 7
901 North Fifth Street
Kansas City, Kansas 66101

and to:

Erin Weekley
Assistant Regional Counsel
United States Environmental Protection Agency – Region 7
901 North Fifth Street
Kansas City, Kansas 66101.

5. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CA/FO shall be claimed by Respondent as a deduction for federal tax purposes, nor for state or local tax purposes where such a deduction is prohibited by applicable tax laws.

6. The effective date of this Order shall be the date on which it is signed by the Regional Judicial Officer.

7. Respondent and Complainant shall bear their own costs and attorneys' fees incurred as a result of this matter.

COMPLAINANT:

U. S. ENVIRONMENTAL PROTECTION AGENCY

Date: 24 Jul 2012

By:

Becky Weber

Becky Weber

Director

Air and Waste Management Division

Date: 7/24/2012

By:

Erin Weekley

Erin Weekley

Assistant Regional Counsel

Office of Regional Counsel

RESPONDENT:

SOUTHWEST TECHNOLOGIES, INC.

Date: 19 JULY 2012

By:

Edward I. Stout

Printed Name:

EDWARD I. STOUT

Title:

CHAIRMAN

IT IS SO ORDERED. This Order shall become effective immediately.

Date: July 27, 2012

By: Robert L. Patrick
Robert L. Patrick
Regional Judicial Officer
United States Environmental Protection Agency
Region 7

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:

Copy hand delivered to Attorney for Complainant:

Erin Weekley
Assistant Regional Counsel
Region 7
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by certified mail, return receipt requested to:

John Phillips
President
Southwest Technologies, Inc.
1746 Levee Road
North Kansas City, Missouri 64116

Dated: 7/27/12

By: Kathy Robinson

Kathy Robinson
Hearing Clerk
United States Environmental Protection Agency
Region 7